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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE MATTER OF

IMPLEMENTATION OF SECTION 304 OF THE
TELECOMMUNICATIONS ACT OF 1996

COMMERCIAL AVAILABILITY OF
NAVIGATION DEVICES

CC DOCKET No. 97-80

**REPLY COMMENTS OF
THE BUSINESS SOFTWARE ALLIANCE**

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TABLE OF CONTENTS

	PAGE
SUMMARY AND INTRODUCTION	1
I. THE COMMISSION SHOULD REJECT PROPOSALS THAT WOULD DEPRIVE CONSUMERS OF THE BENEFITS OF A COMPETITIVE MARKET FOR MVPD EQUIPMENT	3
II. THE COMMISSION NEED NOT -- AND SHOULD NOT -- IMPOSE STANDARDS	6
III. THE COMMISSION SHOULD ALLOW THE COPY PROTECTION TECHNICAL WORKING GROUP TO ADDRESS ISSUES ARISING OUT OF DVD TECHNOLOGY	8
CONCLUSION	10

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REPLY COMMENTS OF THE BUSINESS SOFTWARE ALLIANCE

The Business Software Alliance ("BSA") hereby replies to the comments filed in response to the Commission's Notice of Proposed Rulemaking regarding implementation of Section 629 of the Communications Act.¹

SUMMARY AND INTRODUCTION

The comments filed in this proceeding advance three significantly different approaches to implementing Section 629 of the Communications Act. At one extreme, some members of the cable industry and some of their current major equipment suppliers ask the Commission to interpret Section 629 so narrowly that it would render the provision meaningless. Under their proposed approach, a multichannel video program distribution ("MVPD") system operator would need to

¹ *Implementation of Section 304 of the Telecommunications Act of 1996 -- Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking, CS Docket No. 97-80, FCC 97-53 (rel. Feb. 20, 1997) ("Notice").

do no more than to designate a single retailer to distribute precisely the same customer premises equipment ("CPE") that the system operator now makes available to its customers. The operators would retain the ability to prohibit consumers from attaching any other equipment. At the other extreme, Viacom and several consumer electronics retailers advocate a heavy-handed regime of government standardization, which would mandate that every piece of MVPD CPE be "portable" and "interoperable."

In contrast to these extreme approaches, a broad range of industry participants joined with BSA to advocate a measured approach designed to achieve Congress' paramount goal -- ensuring consumer choice -- while avoiding unnecessary government regulation that could stifle innovation. Many of these parties advocate providing consumers with a clear "right to attach" CPE to MVPD systems, subject only to requirements necessary to prevent theft of programming or network harm, while imposing network disclosure² and no-bundling requirements³ on MVPD systems that are not subject to effective competition.

As demonstrated below, the Commission should reject the "do nothing" approach advocated by some segments of the cable industry, as well as the "standardize everything" approach advocated by Viacom and some consumer

² See, e.g., Joint Comments of Information Technology Industry Council ("ITI") and Computer Technology Industry Association ("CompTIA") at 10-14; Echelon Corp. ("Echelon") Comments at 31.

³ See, e.g., Telecommunications Industry Association ("TIA") Comments at 14-15; Joint Comments of ITI and CompTIA at 22-24.

electronics manufacturers. Instead, the Commission should adopt the pro-competitive, deregulatory approach advanced by BSA and others.

The Commission also should reject Time Warner's attempt to use this proceeding as a vehicle to advance its efforts to impose restrictions on computer users' ability to use digital video discs.⁴ This proposal is both ill-conceived and entirely outside the scope of the present proceeding.

I. THE COMMISSION SHOULD REJECT PROPOSALS THAT WOULD DEPRIVE CONSUMERS OF THE BENEFITS OF A COMPETITIVE MARKET FOR MVPD EQUIPMENT

While the vast majority of commenters recognize that Congress adopted Section 629 in order to increase consumer choice, several parties ask the Commission to construe this provision in a manner that would deprive consumers of any meaningful choice in the market for equipment that can attach to MVPD systems. The Commission should decline this invitation.

These commenters, lead by General Instrument, contend that the "commercial availability" requirement means nothing more than that MVPD CPE must be manufactured and distributed by a single vendor that is "not affiliated" with an MVPD system.⁵ Under this approach, the MVPD system operator could

⁴ See Time Warner Comments at 13-14, 41.

⁵ See, e.g., General Instrument Comments at 16-19 ("[T]he term 'commercial availability' by Congress and the federal courts ... mean[s] availability from a single vendor." (emphasis in original); National Cable Television Association ("NCTA") Comments at 21 ("[S]o long as the CPE is available to the public from at least one unaffiliated vendor, the statutory command should be deemed met.").

have an extremely close contractual relationship with the designated manufacturer and distributor. Indeed, the *only* restriction advocated by General Instrument is that the MVPD not have a direct equity interest of more than 10 percent in these entities.⁶ Exclusive licenses, comprehensive agency agreements, and unlimited royalty interests would be permissible.⁷

These commenters further ask the Commission to give MVPD system operators unfettered discretion to prevent consumers from attaching any equipment manufactured or distributed by an entity other than the one selected by the operator. According to General Instrument, "the only workable approach is for the Commission to qualify the consumer's right to attach MVPD equipment by the right of the network provider to establish and enforce what can be attached to its network."⁸

The Commission should reject this approach. Section 629 directs the Commission to adopt regulations that will ensure "commercial availability to consumers . . . of converter boxes, interactive communications equipment, and other equipment . . . from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."⁹ The legislative history

⁶ See General Instrument Comments at 26.

⁷ See NCTA Comments at 20 (An MVPD should be allowed to develop or select technology, and license a single manufacturer to produce it).

⁸ See, e.g., General Instrument Comments at 72-73; NCTA Comments at 5 (*Carterfone* "right to attach" principle should not be applied to cable systems).

⁹ 47 U.S.C. § 629(a).

makes clear that Congress adopted this provision in order to ensure that "consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device, or other equipment from the cable system or network operator."¹⁰ Under the approach advocated by General Instrument, however, MVPD systems could continue to "force" consumers to purchase or lease specific proprietary equipment -- as long as the MVPD system did not have more than a ten percent equity interest in the entities that manufactured or distributed the equipment.

As BSA demonstrated in its initial comments (and a broad coalition of computer hardware and software manufacturers, consumer electronic retailers, and consumer advocates make clear in their reply comments), the Commission needs to apply Section 629 pragmatically. MVPD CPE should only be deemed to be commercially available if "consumers have the ability to chose from a variety of brands available from a variety of sources, at least some of which are independent of the system operator."¹¹ Consumers, moreover, must be given a clear "right to attach" this equipment to MVPD systems -- unless the system operators can *demonstrate* that doing so would result in harm to the system, theft of programming,

¹⁰ H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., at 181 (Jan. 31, 1996).

¹¹ Reply Comments of the Navigation Device Competition Coalition at 4 (quoting BSA Comments at 2); See Joint Comments of ITI and CompTIA at 16-18 (Commercial availability does not exist where contractual arrangements foreclose competition).

signal leakage, or similar "public detriment."¹² Only in this way can Congress' goal -- the creation of a competitive market for MVPD CPE -- be achieved.

II. THE COMMISSION NEED NOT -- AND SHOULD NOT -- IMPOSE STANDARDS

While some commenters would have the Commission interpret Section 629 so narrowly that it would be rendered meaningless, other parties seek to use this provision as a vehicle to have the Commission mandate wide-ranging standards. Viacom takes the most radical position. It insists that, in order to meet the statutory requirements, MVPD CPE "must be produced pursuant to universal standards."¹³ Under this approach, the Commission would require that *every* piece of MVPD CPE be designed to allow consumers use the same device when, for example, they change cable systems ("portability"), as well as when they switch from a cable system to a DBS system ("interoperability"). Several of the consumer electronics retailers take a somewhat more modest approach. CERC, for example, urges the Commission to require that MVPD CPE be "portable" but, does not call on the agency to adopt standards that would force all MVPD CPE to be "interoperable."¹⁴

¹² See, e.g., TIA Comments at 3; Motorola Comments at 10-13; Joint Comments of ITI and CompTIA at 5-7, 24-25; CERC Comments at 16 n.10; Circuit City Comments at 22-23.

¹³ Viacom Comments at 11.

¹⁴ CERC Comments at 8; see also Circuit City Comments at 26 (advocates "middle" option of portability but not interoperability); Tandy Corp. Comments at 8-12 (government standards should be limited to portability across *similar* MVPD systems).

BSA strongly opposes any effort to transform the limited goals of Section 629 into a mandate for the Commission to impose standards on this fast-evolving industry. Contrary to the suggestion of Viacom and some retailers, Section 629 does *not* require the Commission to ensure that all MVPD CPE is either "portable" or "interoperable." Indeed, these words appear nowhere in the statute or the legislative history. Rather, the statute directs the Commission to promulgate regulations necessary to achieve a more modest goal: ensuring that such equipment is "commercially available."

To achieve the goal of "commercial availability," consumers must have an opportunity to obtain CPE from multiple providers. However, it is for the competitive market -- not the Commission -- to determine what level of "portability" and "interoperability" should be incorporated in this equipment.¹⁵ The fact that some commenters propose that industry take the lead in developing standards designed to achieve these goals, with the FCC "adopting" the result, does not make the process any more acceptable.¹⁶ Government "over-sight" inevitably would result in the imposition of standards that reflect political compromise, rather than consumer demand and technological innovation.

As experience in the market for computer hardware and software demonstrates, vigorous competition -- unfettered by unnecessary government

¹⁵ See, e.g., Echelon Comments at 24-28; Motorola Comments at 16-19; Ad Hoc Computer and High-Technology Coalition Comments at 4-8; TIA Comments at 4-5.

¹⁶ See, e.g., CERC Comments at 17-19.

regulation -- is the best means to ensure that the American consumer has access to a wide range of innovative, high-quality products at affordable prices. The Commission should reject any proposal that would threaten the ability of consumers of MVPD CPE to enjoy these benefits.

III. THE COMMISSION SHOULD ALLOW THE COPY PROTECTION TECHNICAL WORKING GROUP TO ADDRESS ISSUES ARISING OUT OF DVD TECHNOLOGY

In its opening comments, Time Warner raises the specter of a Commission-mandated solution to copy protection issues, including those involving digital video disc ("DVD") technology.¹⁷ Commission intervention in this area would be both inappropriate and inconsistent with the Telecommunications Act, which seeks to promote private sector leadership and reduce government intervention. As even Time Warner recognizes, the industry led effort in this area, the Copy Protection Working Group, operating through a private licensing entity, is well on the way to resolving these issues.¹⁸ These private negotiations are the best place to resolve such thorny matters.

Contrary to Time Warner's suggestion,¹⁹ Section 629 does *not* provide the Commission with authority to impose standards that require MVPD CPE to include security interfaces similar to those that industry may adopt for DVD.

¹⁷ Time Warner comments at 13-14, 41.

¹⁸ *See id.* at 14.

¹⁹ *See id.* at 41


Consequently, the Commission cannot consider issues related to DVD technology as part of the present proceeding. In light of the limited scope of Section 629, and the statutory policy favoring the industry-led discussion currently taking place, the Commission should reject Time Warner's ill-conceived and unsupported proposal.

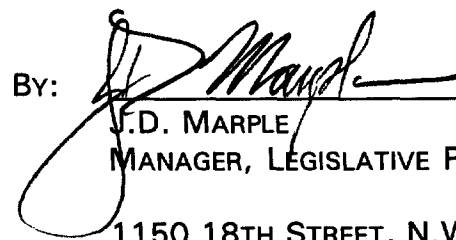
CONCLUSION

For the foregoing reasons, as well as those contained in its opening comments, BSA urges the Commission to adopt a measured approach towards implementation of Section 629, which will achieve Congress' paramount goal -- ensuring consumer choice -- while avoiding unnecessary government regulation that could stifle innovation. To do so, the Commission should make clear that consumers have a broad right to attach competitively provided CPE to any MVPD system, while imposing network information disclosure and no-bundling rules on those MVPD systems that are not subject to effective competition.

Respectfully Submitted,

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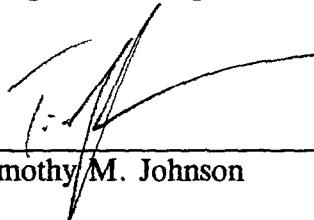
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JUNE 23, 1997

CERTIFICATE OF SERVICE

I, Timothy M. Johnson, do hereby certify that on this 23rd day of June, 1997, I have caused a copy of the "Reply Comments of the Business Software Alliance" in CS Docket No. 97-80 to be served by first-class mail, postage pre-paid, to the persons listed below.



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